Supreme Court, U.S.
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No. 93-1564

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALASKA, ALASKA ALCOHOLIC BEVERAGE CONTROL BOARD, and ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS, Petitioners

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS AND STATE OF ALASKA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the IRS can create an asset for seizure by forcing the State of Alaska to transfer a liquor license in contravention of state-created conditions on transferability of the license.

2. Whether the Twenty-first Amendment to the United States Constitution precludes the IRS from enforcement of its federal tax lien by foreclosure and transfer of a state-created liquor license in contravention of the state's laws regulating liquor.

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v.

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REPLY BRIEF FOR THE ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS AND STATE OF ALASKA, ALCOHOLIC BEVERAGE CONTROL BOARD

SUMMARY OF ARGUMENT

The United States opposes this Court's grant of review, arguing that this case is "not the proper vehicle for resolution of this important, recurring question." (Gov't Br. at 8) The federal government asserts that petitioners have "fully prevailed" below and therefore lack a legitimate basis for obtaining further review. Petitioners submit that they did not *fully* prevail and that this case is the *most appropriate vehicle* for determination of the question presented by the conflict in decisions of the United States courts of appeals. The case at bar presents the issue of what analysis the federal courts should apply in the determination of the nature of the property interest in a state-created liquor license, including state-created

conditions on transfer of such a license, when the federal government asserts a tax claim.

ARGUMENT

A. Importance and Substantiality of the Question Presented for Review is Conceded by the Federal Government.

The federal government did not deny the importance and substantiality of the questions presented in this petition in their brief. The federal government identifies the existence of a conflict in the United States courts of appeals on the issues presented here. The Ninth Circuit has analyzed the nature of a property interest created by state statute to conclude that the statutory conditions on transferability of a state-created liquor license, requiring payment of state and local taxes, are an integral part of the property attached by IRS lien. The Sixth Circuit, in its analysis of a statute similar to Alaska's statute, viewed the statutory conditions on transferability as a mere debt collection scheme and not a component of the "property interest" of the liquor license created by the state. The federal government concedes that this question -- of the nature of the property interest in a liquor license attached by a federal tax lien -- is one of recurring national importance.[1] (Gov't. Br. at 8)

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[1] As pointed out by the United States, there are numerous states with similar statutes. See Ariz. Rev. Stat. Ann. § 4-210(A)(5) (1989 & Supp. 1993); Cal. Bus. & Prof. Code § 24049 (West 1985); Haw. Rev. Stat. § 281-45(3) (1992); Md. Ann. Code art. 2B, § 74(a)(1) (1993); N.M. Stat. Ann. § 7-1-82(A) (1993); Pa. Stat. Ann. tit. 47, § 4-477(d)(3) (Supp. 1994); R.I. Gen. Laws § 3-5-19 (1987); S.D. Codified Laws Ann. § 35-2-7 (1992).

B. The Petitioners Have Not Fully Prevailed In The Case Below

The United States' sole opposition to granting of the petition in this case is based on its assertion that the State of Alaska ("Alaska") and the Alaska Hotel and Restaurant Employee Pension Fund ("Pension Fund") fully prevailed in the case below. The federal government mischaracterizes or at a minimum overstates the practical effect of the Ninth Circuit's unpublished memorandum below.

Although the Ninth Circuit panel did affirm the order of the district court rescinding the purported sale of the Alaska liquor license by the IRS, the panel specifically noted that:

> Under *Kimura*, the State of Alaska and City and Borough of Juneau are entitled to assert their interests in the license through the state statutory scheme.

(Pet. App. at 22). *In re Kimura (United States v. Battley)*, 969 F.2d 806 (9th Cir. 1992) was a bankruptcy case involving a state liquor license.[2] In that case, the federal government and other creditors did not object to the transfer of the liquor license by the ABC Board. Since there was no assertion of a creditor's right to block transfer under state statute, the ABC Board accordingly transferred the license. The parties subsequently disputed the distribution of the sale proceeds. The court determined that the federal government had a superior claim to the proceeds over other creditors (after the payment of state and local tax debts). By footnote in this case, the 9th Circuit extended the holding of *Kimura* to apply to the

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[2] The state was not a party to that case.

transfer decision made by the ABC Board when objections are asserted. (Pet. App. at 22, n.3) It is undisputed that, by this language in the decision, Pension Fund and other creditors are *not* entitled to rely on the state statutory scheme to block transfer of the liquor license. It cannot be gainsaid that the Pension Fund has lost in the decision below; it must assert a request for review at this time in order to preserve its ability to rely on the statutory conditions of Alaska's liquor license law.

Alaska also respectfully submits that it has not "fully" prevailed. If the state's only interests were pecuniary then it has prevailed, because its taxes must be paid under the circuit court's decision. By seeking review contrary to its pecuniary interest[3], Alaska is demonstrating the strength of its concern about the impact of the lower court's decision on its constitutionally-protected control of its liquor industry through its liquor licensing process.

In its petition, Alaska has demonstrated its substantial and constitutionally-protected interests in preserving the statutory framework it has adopted for regulation of the sale and distribution of alcoholic beverages. This statutory scheme includes restrictions on interests in licenses and conditions on transferability of this wholly state-created property interest. (See Pet. Br. at 9 - 10, 17 - 21) By ruling that only Alaska and its local governments, but not other creditors, are entitled to assert their rights under that statutory scheme, the Ninth Circuit has invalidated a key component of the state's regulatory scheme to control the sale and distribution of alcoholic beverages in the State of Alaska. Therefore the federal government's assertion that

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[3] The state is requesting this Court to place it on equal footing with other creditors, each of whom could block transfer of a license if all debts and taxes are not paid.

the State of Alaska has "fully prevailed" misleads the Court and overstates the state's position.

C. This Case Presents The Most Appropriate Vehicle For Review Of The Questions Presented.

Even if the Petitioners are deemed to have prevailed below, this case still presents the most appropriate vehicle for review of the questions presented. As the federal government points out, 28 U.S.C. § 1254(1) affords jurisdiction to this Court for the review on petition by "any party" of a decision of the United States courts of appeals. (Gov't. Br. at 9 n.6) Although the decision of the district court to rescind the IRS's purported sale of a state-created liquor license was affirmed, Petitioners do not seek review here merely of a defect in the court's reasoning. (Gov't. Br. at 9) Petitioners seek review of the decision of the Ninth Circuit that invalidates those portions of the state statute conditioning transfer of a state-created liquor license on payment of all debts, as well as taxes.

The case law cited by the federal government, to support its argument that this case is not the "proper vehicle" for review, is wholly distinguishable. The authorities cited were cases in which this Court declined to review judgments and decisions of state courts that rest on independent state grounds. *See Black v. Cutter Lab.*, 351 U.S. 292 (1956) and *Herb v. Pitcairn*, 324 U.S. 117 (1945). Both of these cases cited by the federal government turned on the rule that this Court will not review a decision of a state court where there exists an adequate independent state ground for affirmance of the judgment.

The federal government's quotations of specific language from those cases are taken wholly out of context.

When those cited portions are read in context, they do not support the proposition cited. For instance, this Court in *Black v. Cutter Laboratories* stated:

> This means no more than that we should not pass on federal questions discussed in an opinion where it appears that the judgment rests on adequate state grounds. (citation omitted).

351 U.S. at 298. Similarly, in the sentence immediately preceding the quoted section in the federal government's brief, the Court in *Herb v. Pitcairn* stated:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

324 U.S. at 126. Thus the federal government's reliance on these cases is misguided.

Petitioners submit that because this case arrives at the United States Supreme Court outside the bankruptcy court context, this case is the *most appropriate vehicle* for the review of the important and substantial questions presented. The conflict within the circuits identified by the federal government arises from two separate approaches taken by the Ninth and Sixth Circuits in the legal analysis of wholly state-created property -- a liquor license. In both circuits, the courts have identified the threshold issue to be the determination of the nature of that property to which an IRS federal tax lien may attach. However, the Ninth Circuit views the statutorily-set conditions on transfer of the liquor license, i.e. payment of taxes, as an integral part of that property interest to which the federal tax lien attaches. The Sixth Circuit views those statutory conditions as merely a debt collection scheme which changes the priority of claims to be paid.

Petitioners have referred to this dichotomy as the "nature of the property interest" analysis of the Ninth Circuit Court of Appeals as opposed to the "priority of claims" analysis employed by the Sixth Circuit Court of Appeals. Interestingly this dichotomy is also demonstrated quite vividly by the differing recitation of questions presented for review in this case by petitioners and the United States:

Petitioner's Questions Presented	**Respondent's Questions Presented**
1. Whether the IRS can create an asset for seizure by forcing the State of Alaska to transfer a liquor license in contravention of the state-created conditions on transferability of the license. 2. Whether the Twenty-first Amendment to the United States Constitution precludes the IRS from enforcement of its federal tax lien by foreclosure and transfer of the state-created liquor license in contravention of the state's laws regulating liquor.	1. Whether, by requiring state liquor licensees to pay all outstanding state and local taxes as a condition for approval of any transfer of the license, the State of Alaska may obtain priority in the distribution of the proceeds of the sale of the license over a perfected federal tax lien. 2. Whether the sale by the Internal Revenue Service of the taxpayer's interest in a liquor license to which a federal tax lien has attached must be rescinded because state and local tax claims have not been paid in full.

(Emphasis added.)

The supervision of this Court is needed to determine which of the approaches to the analysis of state-created liquor licenses should prevail. Under a "nature of the

property" analysis, it can be seen that the IRS, when it seized the liquor license, acquired at most whatever property interest the Quintos held. The IRS was thereby subject to the same conditions of transfer as the Quintos including the need to provide for payment of all debts under Alaska statute. Under the federal government's "priority of claims" analysis, the IRS is promoted to a higher level of property interest in the liquor license than that held by the taxpayer because of its super-priority as a federal tax lien. The state-created conditions on transfer fall by the wayside as a contravening priority system. The states' rights under the Twenty-first Amendment to control the sale and distribution of alcohol within their borders is disregarded. In light of the inability of the United States courts of appeals to address uniformly this issue of the transferability of state-created property interests, the need for plenary review by this Court is indisputable.

Petitioners respectfully request the Court to grant review of their petition.

DATED this 18th day of May, 1994

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